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No. 79-1875

In the Supreme Court of the United States

OCTOBER TERM, 1979

ENERGY CONSUMERS AND PRODUCERS ASSOCIATION, INC., PETITIONER

v.

DEPARTMENT OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals over "all appeals from the district courts of the United States in cases and controversies arising under" the Emergency Petroleum Allocation Act of 1973 extends to an appeal by the Department of Energy, in an action brought under the EPAA, from a judgment of the district court declaring invalid a ruling issued by DOE for failure to comply with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553.

2. Whether the Department of Energy's ruling relating to an exemption from price controls of crude oil produced from "stripper wells" was interpretative and therefore exempt from the notice and comment procedures of the Administrative Procedure Act under 5 U.S.C. 553(b)(A).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes involved 1

Statement 1

Argument 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Bray v. *United States*, 423 U.S. 73 5

British Caledonian Airways, Ltd. v. *CAB*, 584 F. 2d 982 6

Chrysler Corp. v. *Brown*, 441 U.S. 281 6

Energy Reserves Group, Inc. v. *Department of Energy*, 589 F. 2d 1082 5

Garelick Mfg. Co. v. *Dillon*, 313 F. 2d 899 5

General Electric Co. v. *Gilbert*, 429 U.S. 125 6

Gibson Wine Co. v. *Snyder*, 194 F. 2d 329 6

Joseph v. *United States Civil Serv. Comm'n*, 554 F. 2d 1140 6

National Retired Teachers Ass'n v. *U.S. Postal Serv.*, 593 F. 2d 1360 6

Shell Oil Co. v. *FPC*, 491 F. 2d 82 6

Page

Cases—Continued:

Texaco, Inc. v. *Department of Energy*, 616 F. 2d 1193 5

Ven-Fuel, Inc. v. *Duncan*, cert. denied, No. 79-1498 (June 9, 1980) 4

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:

5 U.S.C. 553 ..... 2, 5

5 U.S.C. 553(b) 1

5 U.S.C. 553(b)(A) 3

Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. (Supp. II) 7101 *et seq.* 2

Economic Stabilization Act of 1970, 12 U.S.C. 1904 note 1

Section 211(b)(2) 1

Section 211(g) 1

Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. 751 *et seq.*:

Section 4(e)(2)(A), 15 U.S.C. (Supp. IV 1970 ed.) 753(e)(2)(A) 1

Section 5(a)(1), 15 U.S.C. 754(a)(1) 1, 3, 4, 5

Section 8(i), 15 U.S.C. 757(i) 2

Energy Conservation and Production Act of 1976, Pub. L. No. 94-385, Section 121, 90 Stat. 1132 2

Page

Statutes and regulations—Continued:

Energy Policy and Conservation Act. Pub. L. No. 94-163, 89 Stat. 871 2

Trans-Alaska Pipeline Authorization Act. Pub. L. No. 93-153, 87 Stat. 576 1

18 U.S.C. 401 5

6 C.F.R. 150.54(s) (1974) 2

10 C.F.R. 210.32 (1976) 2

Miscellaneous:

Exec. Order No. 12009 (42 Fed. Reg. 46267 (1977)) 2

The Attorney General's Manual on the Administrative Procedure Act (1947) 6

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A-1 to A-32) and the district court (Pet. App. A-39 to A-53) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1980. A petition for rehearing was denied on April 28, 1980 (Pet. App. A-33). The petition for a writ of certiorari was filed on May 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATUTES INVOLVED

The pertinent provisions of Section 211(b)(2) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, which is incorporated into Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1), are set forth at Pet. 2. The pertinent provisions of 5 U.S.C. 553(b) are set forth at Pet. 3.

STATEMENT

In 1973, Congress enacted the Emergency Petroleum Allocation Act ("EPAA"), Pub. L. No. 93-159, 87 Stat. 627 *et seq.*, which imposed an emergency mandatory system of allocation and control of prices of petroleum products. Section 4(e)(2)(A) of the EPAA exempted from price control regulations crude oil from leases whose average daily production did not exceed ten barrels per well; such low-yield wells are known as "stripper wells."[1]

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[1]The stripper well exemption first appeared in Section 406 of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576. Although the exemption in Section 4(e)(2)(A) of the EPAA was repealed in 1975 by the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*, it subsequently was

Regulations implementing the stripper well exemption were originally codified at 6 C.F.R. 150.54(s) (1974) and were later recodified at 10 C.F.R. 210.32 (1976). In 1975, the Federal Energy Administration ("FEA"), a predecessor agency to the Department of Energy ("DOE"),[2] issued Ruling 1975-12, Part III, which interprets the stripper well exemption to allow producers to count a "multiple completion well" as more than one well in calculating the average daily production per well for purposes of the exemption. A multiple completion well produces oil from more than one crude oil reservoir through a common well casing while segregating the oil produced from each reservoir into a separate tubing string.

Petitioner filed this action for declaratory and injunctive relief in the United States District Court for the Eastern District of Oklahoma, claiming, *inter alia*, that Part III of Ruling 1975-12 was invalid because it was arbitrary and capricious and was issued without observance of the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553. Petitioner brought this suit on behalf of its members producing oil from "commingled wells," which, under Part III of Ruling 1975-12, are not counted as more than one well for purposes of the stripper well exemption. A commingled well, like a multiple completion well, produces oil from more than one crude oil reservoir through a common well

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reinstated by Section 121 of the Energy Conservation and Production Act of 1976, Pub. L. No. 94-385, 90 Stat. 1132-1133. The exemption is currently codified at 15 U.S.C. 757(i).

[2]Effective October 1, 1977, the statutory responsibilities of the Federal Energy Administration were transferred to the Department of Energy pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. (Supp. II) 7101 *et seq.*, and Exec. Order No. 12009 (42 Fed. Reg. 46267 (1977)).

casing. However, a commingled well is fundamentally different from a multiple completion well because, among other things, it does not segregate the oil from each reservoir into separate tubing strings (see Pet. App. A-5 to A-6, A-43 to A-44). After a trial, the district court concluded that Part III of Ruling 1975-12 was not an interpretative rule (5 U.S.C. 553(b)(A)) and, accordingly, that the ruling was void because of FEA's failure to comply with the notice and comment provisions of the APA prior to issuing the ruling (Pet. App. A-39 to A-54).

On appeal, the Temporary Emergency Court of Appeals reversed (Pet. App. A-1 to A-32). TECA first concluded that it had jurisdiction over the appeal, observing that the notice and comment provisions of the APA had been incorporated by reference in Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1), and that it was uncontroverted that TECA "has exclusive jurisdiction of appeals from final decisions by district courts on issues arising under the EPAA" (Pet. App. A-20 to A-21). In addition, TECA concluded that while the agency's designation of Part III of Ruling 1975-12 as interpretative was not binding on the courts, "an examination of the material statute, the legislative history, the regulation, and the rule demonstrates that it is interpretative, and expressly exempt from the notice and comment procedures of the APA" (Pet. App. A-27).[3]

After examining the trial record, TECA concluded that, although it was not compelled to accept Part III of Ruling 1975-12 as a correct interpretation of the stripper well

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[3]In support of its conclusion that the ruling is interpretative, TECA noted (Pet. App. A-27) that "Part III of Ruling 1975-12 is in form and substance an interpretation of the preexisting 'stripper well' statutory exemption and the preexisting regulation * * *. Neither in form or substance did it expand or contract the meaning of the term 'well' as used in the statute or regulation."

exemption, the ruling was a reasonable interpretation of the underlying statute and regulatory exemption (Pet. App. A-28 to A-31). TECA also concluded that FEA's construction of the stripper well exemption in Part III of Ruling 1975-12 to permit only a multiple completion well and not a commingled well to be counted as more than one well was consistent with the statutory and regulatory scheme (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 5-9) that TECA's jurisdiction is limited only to those issues that are directly linked to the price control program established by the EPAA and does not extend to issues of general law that arise in the course of adjudicating an action brought under the EPAA. In this case, petitioner claims, the only issue raised in DOE's appeal was one of general administrative law, *i.e.*, whether Part III of Ruling 1975-12 is an interpretative rule, and that such issues are not within TECA's jurisdiction, but are instead within the exclusive jurisdiction of the eleven circuit courts of appeals. In *Ven-Fuel, Inc.* v. *Duncan*, cert. denied, No. 79-1498 (June 9, 1980), this Court recently declined to review a similar contention, concerning TECA's jurisdiction over an appeal from the dismissal of an EPAA claim for failure to exhaust administrative remedies.[4] There is even less reason to grant review here, since, as TECA noted, the notice and comment provisions of the APA were expressly incorporated by reference in Section 5(a)(1) of the EPAA. As the court below observed, " '[a]n issue arising under the APA is not a collateral issue, then, but, by virtue of Section 5(a)(1) of the EPAA an issue arising under the EPAA itself' " (Pet.

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[4]We are sending petitioner a copy of our brief in opposition in *Ven-Fuel*.

App. A-20, quoting *Texaco, Inc.* v. *Department of Energy*, 616 F. 2d 1193, 1198 n.4 (TECA 1979)).

Petitioner's reliance (Pet. 6) on *Bray* v. *United States*, 423 U.S. 73 (1975), is misplaced. In *Bray*, this Court held that TECA did not have jurisdiction to review a contempt conviction arising solely under a federal criminal statute (18 U.S.C. 401) not within TECA's appellate jurisdiction, even though the contempt had been committed in a case arising under a statute that is within TECA's jurisdiction. Here, unlike the contempt proceeding in *Bray*, petitioner's action arises directly under EPAA, and the procedural issue presented in DOE's appeal is based on a statute that is expressly incorporated in the EPAA. Accordingly, TECA properly concluded that it had jurisdiction over the instant case.

2. Petitioner contends (Pet. 9-12) that Part III of Ruling 1975-12 was not an interpretative rule and that therefore DOE was required to comply with the notice and comment provisions of the APA (5 U.S.C. 553) prior to issuing the ruling. We submit that the court below correctly determined (Pet. App. A-27) that the ruling was interpretative in nature because it neither expanded nor contracted the statutory and regulatory exemption but merely clarified the term "well" for purposes of the stripper well exemption. See *Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F. 2d 1082, 1092 (TECA 1978); *Garelick Mfg. Co.* v. *Dillon*, 313 F. 2d 899, 900 (D.C. Cir. 1963) (regulation clarifying terms contained in preexisting regulation was interpretative rule).

In holding that the ruling was interpretative, TECA correctly observed that DOE claimed for the ruling only the limited effect of an interpretative rule. Although a legislative regulation is treated as having the force and effect of law, an interpretative rule will, at most, be

accorded deference. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296, 301-302, 313-315 (1979). Interpretative rules, in other words, have no binding effect. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976). Rather, they reflect the position of the agency on the particular subject addressed therein. *Gibson Wine Co.* v. *Snyder*, 194 F. 2d 329, 331 (D.C. Cir. 1952).[5]

In sum, the issue presented here is simply whether TECA was correct in determining that an agency ruling was interpretative in nature. Resolution of that issue involves the application of settled principles of law to the particular ruling in the context of the entire statutory and regulatory scheme. TECA's thorough discussion demonstrates that it employed the proper analysis and reached the correct result in this case. Further review is especially inappropriate here, in view of petitioner's failure to challenge TECA's additional conclusion that the ruling was a reasonable interpretation of the stripper well exemption.[6]

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[5]Accord, *National Retired Teachers Ass'n* v. *U.S. Postal Serv.*, 593 F. 2d 1360, 1363 (D.C. Cir. 1979); *British Caledonian Airways, Ltd.* v. *CAB*, 584 F. 2d 982, 989 (D.C. Cir. 1978); *Joseph* v. *United States Civil Serv. Comm'n*, 554 F. 2d 1140, 1153 n.24, 1154 n.26 (D.C. Cir. 1977); *Shell Oil Co.* v. *FPC*, 491 F. 2d 82, 88 (5th Cir. 1974). See also *The Attorney General's Manual on the Administrative Procedure Act* 30 (1947).

[6]It should be noted that prior to the issuance of Ruling 1975-12, Part III, producers were not expressly authorized to count any type of well as more than one well for purposes of the stripper well exemption. Thus, even if petitioners were to succeed in invalidating the ruling on procedural grounds, DOE would still be authorized to interpret the stripper well exemption to refuse to permit petitioner's members to count a commingled well as more than one well under the exemption. Because petitioner's members would seem to have little, if anything, to gain by overturning the DOE ruling, further review of TECA's decision is especially inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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